

**FIRE**Foundation for Individual
Rights and Expression

September 6, 2023

Via ECF

David J. Smith
Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: *Novoa v. Commissioner of the FL State Board of Education, et al.*,
No. 22-13994, Plaintiffs-Appellees' Notice of Supplemental Authority

Dear Mr. Smith:

Under Federal Rule of Appellate Procedure 28(j), Plaintiff-Appellees Adriana Novoa, Samuel Rechek, and the First Amendment Forum at the University of South Florida bring the Court's attention to the Second Circuit's recent decision in *Heim v. Daniel*. There, the Second Circuit joined the Fourth, Fifth, Sixth, and Ninth Circuits in holding that *Garcetti*'s "official duties" framework does not apply to speech related to scholarship or teaching in higher education. No. 22-1135-CV, 2023 WL 5597837, at *12 (2d Cir. Aug. 30, 2023). *Heim*'s holding is just one more refuting the State's insistence that *Garcetti*'s "official duties" framework applies to speech related to scholarship or teaching. A copy of the *Heim* decision is attached.

As the Second Circuit explained, "*Garcetti*'s bar on First Amendment protection for any 'official-duty' speech would... have the effect of exiling all public-university faculty scholarship and instruction from the shelter of the First Amendment." *Id.* at *11. Such an outcome "cannot be squared with the Supreme Court's long-professed, 'deep[] commit[ment] to safeguarding academic freedom' as 'a special concern of the First Amendment.'" *Id.* at *12 (citation omitted). Rather than permit professors to "speak freely, guided by their own professional expertise, on subjects within their academic disciplines[]" the Stop Woke Act puts professors' livelihoods on the line for simply endorsing a debated concept like affirmative action. Appellees' Br. 5; 2023 WL 5597837, at *11 (citation omitted).

The Second Circuit's opinion supports Plaintiffs' position that speech related to scholarship or teaching is not government speech subject to *Garcetti*'s "official duties" framework. Appellees' Br. 40-46. Because "a professor's academic

speech is anything but speech by an ordinary government employee, . . . *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to [a public university professor’s] teaching and academic writing[.]” 2023 WL 5597837, at *12 (citations omitted).

Like the Second, Fourth, Fifth, Sixth, and Ninth Circuits, this Court should hold that *Garcetti*’s “official duties” framework does not apply to speech related to scholarship or teaching in higher education.

Sincerely,



Greg Harold Greubel
IA Bar No. 201452; PA Bar No. 321130;
NJ Bar No. 171622015; CA Bar No. 343028
FOUNDATION FOR INDIVIDUAL RIGHTS
AND EXPRESSION
510 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106
Tel: (215) 717-3473, ext. 230
greg.greubel@thefire.org

*Attorney for Plaintiffs-Appellees Adriana
Novoa, Sam Rechek, and the First Amendment
Forum.*

cc: All Counsel of Record via ECF

Encl. *Heim v. Daniel*, No. 22-1135-CV, 2023 WL 5597837 (2d Cir. Aug. 30, 2023).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 6, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 6, 2023

/s/ Greg H. Greubel
Greg H. Greubel